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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

NORTHROP CORPORATION AND MAX KILLINGSWORTH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the Attorney General does not have the right to prevent dismissal of a False Claims Act *qui tam* action brought on behalf of the United States, notwithstanding express statutory language stating that such an action "may be dismissed only if the [district] court and the Attorney General give written consent to the dismissal and their reasons for consenting." 31 U.S.C. 3730(b)(1).

2. Whether the court of appeals erred in refusing to allow the Attorney General to intervene to take over prosecution of a *qui tam* action brought on behalf of the United States, despite newly discovered evidence indicating that the extent of the fraud against the United States was substantially greater than had previously been supposed.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is unreported. The opinion of the district court (App., *infra*, 7a-9a) is unreported. An earlier opinion of the court of appeals (App., *infra*, 10a-30a) is reported at 25 F.3d 715. An earlier opinion of the district court (App., *infra*, 31a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1995. A petition for rehearing was denied on March 22, 1996. App., *infra*, 34a-35a. On June 11, 1996, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including July 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 3730 of Title 31, United States Code, is reproduced at App., *infra*, 36a-44a.

STATEMENT

1. The False Claims Act (FCA or Act) prohibits any person from "knowingly" presenting "a false or fraudulent claim for payment or approval" to the federal government. 31 U.S.C. 3729(a)(1). The Act also prohibits a variety of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). Any person who violates the Act is liable to the United States for treble damages and a civil penalty of up to $10,000 for each violation. 31 U.S.C. 3729(a).

The Act provides that the Attorney General of the United States "diligently shall investigate a violation" of the Act, and the Attorney General may bring a civil action if she finds that a person has committed a violation. 31 U.S.C. 3730(a). The Act also authorizes individual citizens (known as "relators") to bring private suits, commonly referred to as *qui tam* actions, to enforce the Act on behalf of the United States. 31 U.S.C. 3730(b)(1).[1] The statute provides

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[1] "Qui tam" is a shortened version of the Latin phrase "qui tam pro domino rege quam pro se imposo in hac parte

that a civil action filed by a *qui tam* relator "may be dismissed only if the [district] court and the Attorney General give written consent to the dismissal and their reasons for consenting." *Ibid.*

When a *qui tam* action is filed, the complaint is sealed and the government must be notified. The government may intervene in the suit "within 60 days after it receives both the complaint and the material evidence and information." 31 U.S.C. 3730(b)(2). If the government chooses to intervene, it has the primary responsibility for prosecuting the action and is not bound by any act of the relator. 31 U.S.C. 3730(c)(1). The relator remains a party to the action, but the government may dismiss or settle the action over his objection as long as the relator is provided with notice and the opportunity for a hearing before the district court. 31 U.S.C. 3730(c)(2). If the government elects not to proceed with the action, the relator "shall have the right to conduct the action" on behalf of the United States. 31 U.S.C. 3730(c)(3). The government can request to be served with copies of all pleadings, and "the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause." *Ibid.*

If a *qui tam* action results in a monetary recovery, the proceeds are divided between the government and the relator. In cases where the government does not intervene and the relator conducts the action, the

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sequitur," which means "who brings the action as well for the king as for himself." *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 746 n.3 (9th Cir. 1993), cert. denied, 114 S. Ct. 1125 (1994).

relator receives between 25 and 30% of the proceeds of the action or settlement, while the United States receives the rest. 31 U.S.C. 3730(d)(2). If the government intervenes and prosecutes the action, the relator receives (subject to certain exceptions) between 15 and 25% of the proceeds. 31 U.S.C. 3730(d)(1).

2. Relator Max Killingsworth brought a *qui tam* action in November, 1988, alleging that defendant Northrop Corporation had submitted inflated cost estimates in connection with contract proposals for the MX missile system. In particular, Killingsworth alleged that Northrop had established "management reserves" prior to contract negotiations and had concealed the existence and extent of those reserves from government negotiators. See 94-56599 C.A. E.R. 6-7 (complaint). That practice violates the contractor's duty to provide the best estimate of the cost of performing the contract, and creates a presumption that the government is damaged dollar-for-dollar by the amount of the hidden management reserve. See *United States ex rel. Taxpayers Against Fraud* v. *Singer Co.*, 889 F.2d 1327, 1329, 1333 (4th Cir. 1989). The government informed Killingsworth's then-counsel that it would decline to exercise its statutory right to take over the action. See App., *infra*, 12a.[2]

Killingsworth subsequently obtained new counsel, who filed an amended complaint in September, 1991. The amended complaint expanded the scope of the

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[2] The Department of Justice subsequently explained to the district court that it had investigated the matter and concluded that there appeared to be some merit to Killingsworth's allegations, but that it had decided to pursue the issue in several other cases in which the fraud appeared to be more extensive. See 94-56599 C.A. Supp. E.R. 85-86 (Notice of Objection to Dismissal of Action).

litigation, specifying several additional contracts in the FCA claim. See 92-55863 C.A. E.R. 1-41 (amended complaint). The amended complaint also included a claim of wrongful discharge. See *id.* at 40. In December, 1991, Northrop informed the government of a proposed settlement negotiated between Northrop and Killingsworth. App., *infra*, 12a. Under that proposed agreement, Northrop would pay $1 million in settlement of the FCA claims (with Killingsworth's share of that sum to be determined by the district court), and $3.2 million in settlement of the wrongful discharge claim (which would not be shared with the government). *Ibid.*; see 94-56599 C.A. E.R. 64-65. The proposed settlement also provided that the FCA claim would be dismissed with prejudice as to Killingsworth and the United States, both of whom would release Northrop from any and all claims relating to the allegations set forth in the amended complaint. 94-56599 C.A. E.R. 65.

The United States objected to the proposed settlement, explaining that in its view an excessive sum had been allocated to Killingsworth's wrongful discharge claim. App., *infra*, 13a; see 94-56599 C.A. Supp. E.R. 81-98 (Notice of Objection to Dismissal of Action). Northrop and Killingsworth then altered the settlement to provide that $1.5 million would be allocated to the FCA claim, with the remaining $2.7 million being allocated to the wrongful discharge claim and to attorney's fees. App., *infra*, 13a. The government informed the parties and the district court that it did not consent to dismissal of the action. *Ibid.* The district court nevertheless entered an order of dismissal, explaining that in its view "the Attorney General's consent to dismissal is not required in the present circumstances." *Id.* at 33a.

3. The government appealed, relying on 31 U.S.C. 3730(b)(1), which provides that a *qui tam* action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." The government argued that Section 3730(b)(1) gives the Attorney General the right to disapprove a dismissal based on settlement of a *qui tam* case even if the Justice Department has not moved to intervene.

The court of appeals reversed and remanded. App., *infra*, 10a-30a (*Killingsworth I*). The court rejected the government's contention that the consent of the Attorney General is a prerequisite to voluntary dismissal of a *qui tam* action. It held that the consent provision applies only during the initial 60-day period after a *qui tam* action is filed, when the United States possesses an unrestricted right (pursuant to 31 U.S.C. 3730(b)(2)) to take over the conduct of the litigation. App., *infra*, 24a. The court acknowledged that "[t]he language in the statute requiring both the government and the court to consent to a dismissal came from the initial *qui tam* statute of 1863," *id.* at 23a, and that "[u]nder the original statute enacted in 1863, the government had no right to take over an action commenced by a *qui tam* plaintiff," *id.* at 20a. The court concluded, however, that "[t]he format and intent of the amended statute * * * do not preserve the government's absolute right to bar a dismissal." *Id.* at 23a. It relied in part on 31 U.S.C. 3730(b)(4)(B), which gives the relator "the right to conduct the action" if the government declines to intervene at the outset of the case. The court asserted that the right to conduct the action "obviously includes the right to negotiate a settlement of that action." App., *infra*, 24a. The court also found support for its decision in

31 U.S.C. 3730(d)(2), which makes clear that a private person "settling [a] claim" under the False Claims Act is entitled to a monetary award. App., *infra*, 24a.

Finally, the court of appeals stated that "the government's assertion of an absolute right to block a settlement and dismissal by withholding its consent may represent a meaningless privilege in terms of present-day *qui tam* litigation." App., *infra*, 24a. The court explained that

> neither the government nor the relator desires to engage in further litigation. If the parties settle the action without a dismissal and thereby effectively stop litigating the case, the trial court would undoubtedly dismiss the suit for failure to prosecute. Conversely, the government may not force Killingsworth and Northrop to continue litigation by refusing to consent to a settlement.

Id. at 24a-25a (footnote and citation omitted).

The court of appeals therefore rejected the government's contention that it possessed a right to block the dismissal pursuant to settlement of a *qui tam* action. The court concluded, however, that "[t]he government, although it chooses not to fully intervene in the action, retains the right, upon a showing of good cause, to object to a proposed settlement." App., *infra*, 26a. The court recognized that the FCA contains no provisions for a hearing on that question, but noted that the Act "does cover the converse situation in which the government settles the action" and the relator objects to the settlement. *Ibid.* (citing 31 U.S.C. 3730(c)(2)(B)). The court of appeals "interpret[ed] the Act to provide a similar opportunity to the government; that is, when the government objects with good cause to a proposed settlement, it has a

right to a hearing, as would an objecting relator." App., *infra*, 29a-30a. Because the district court had not afforded the government any opportunity to press its objections to the proposed settlement, the court of appeals vacated the judgment of dismissal and remanded the case for a hearing "to determine whether the proposed settlement fairly and reasonably allocates the settlement funds." *Id.* at 30a.

4. On remand, Northrop moved to reaffirm the settlement. In 1993, however, during the pendency of the *Killingsworth I* appeal, Killingsworth had in discovery in a separate case obtained additional documents previously withheld by Northrop in this case. See 94-56599 C.A. E.R. 94 (Declaration of Dennis C. Egan). Killingsworth did not provide copies of those documents to government counsel until July 6, 1994—after Northrop had moved to reaffirm the settlement on remand. See *id.* at 75-76 (Declaration of Dennis C. Egan).[3] On July 22, 1994, the government opposed Northrop's motion to reaffirm the settlement, informing the district court of the new evidence and noting that the effect of the proposed agreement would be to dismiss with prejudice claims that the government had not fully investigated. See

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[3] The government's briefs in the Ninth Circuit stated that Killingsworth had briefly shown the new documents to an Assistant United States Attorney in 1993, while the appeal in *Killingsworth I* was pending. See 94-56599 Gov't C.A. Br. 5; 94-56599 Gov't C.A. Reply Br. 1, 9. The court of appeals alluded to that representation in *Killingsworth II*. See App., *infra*, 3a, 6a n.3. The Assistant United States Attorney has since informed us that our earlier statement was in error, and that he did not in fact see the new documents until July, 1994.

Government's Opposition to Northrop's Motion to Reaffirm Settlement at 5.[4]

At the outset of the hearing on Northrop's motion to reaffirm the settlement, government counsel informed the court that the government wished to intervene and take over the litigation. The government asked that its request for intervention be heard and decided before the court ruled on the pending Northrop motion to reaffirm the settlement. See 94-56599 C.A. E.R. 81 (transcript of proceedings). The district court declined, stating that it would first determine whether the government had good cause to object to the settlement. *Id.* at 84. At the conclusion of a brief hearing, the court announced that it would reaffirm the settlement. *Id.* at 91. The court subsequently entered an order reaffirming the settlement and dismissing the case with prejudice. App., *infra*, 7a-9a. The order made clear that the district court had declined to consider the new evidence proffered by the government, which had formed the basis of the government's desire to intervene and prosecute the case further. See *id.* at 8a.

5. The government appealed the dismissal, arguing that the district court had erred in refusing to consider its request to intervene and in refusing to consider the new evidence in deciding whether the settlement was reasonable. The court of appeals affirmed the district court's decision. App., *infra*, 1a-6a

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[4] When combined with the previously available evidence in this case, the government believes that the new documents show hidden management reserves by Northrop in 13 contracts potentially totaling $110.7 million—an amount far exceeding the prior claimed figures for management reserves. See 94-56599 C.A. E.R. 94-95 (Declaration of Dennis C. Egan).

(*Killingsworth II*). The court held that the mandate in *Killingsworth I* had required nothing more than a decision on "whether Killingsworth and Northrop colluded to shift the majority of the settlement funds to Killingsworth's personal claim and attorney's fees thereby depriving the government of its fair share" of the settlement proceeds, and that the district court had therefore properly refused to consider the new evidence before determining that the settlement was fair and reasonable. App., *infra*, 5a. The court also declined to address the government's motion to intervene to take over the litigation, stating that "[a]lthough the government initially raised its motion for intervention before the district court, the judge declined to address it. The government did not attempt to resurrect the motion at some later point in the remand hearing." *Id.* at 5a n.2.

REASONS FOR GRANTING THE PETITION

Qui tam relators play a valuable role in the detection and remediation of False Claims Act violations. *Qui tam* suits, however, are not intended to redress wrongs done to the relators themselves. Rather, a *qui tam* action furnishes a mechanism for addressing fraud *against the United States*. Although the FCA establishes financial incentives for relators to pursue *qui tam* litigation, the bulk of any monetary recovery goes to the United States. In light of the government's paramount stake in the ultimate disposition of *qui tam* litigation, it is essential that officials of the United States be given adequate means to protect the interests of the government and of the public. The False Claims Act provides such protection in its provision that a *qui tam* action "may be dismissed only if the [district] court and the Attorney General

give written consent to the dismissal." 31 U.S.C. 3730(b)(1).

The court of appeals' rulings in this case cannot be reconciled with the plain language of that provision, and they substantially impair the Attorney General's ability to protect the interests of the government and of the public when a *qui tam* relator and defendant—parties who have no obligation or incentive to protect the government's interests—settle and seek to dismiss a False Claims Act case brought on behalf of the United States. In *Killingsworth I*, the court held that the Attorney General does not have a right to prevent the voluntary dismissal of a *qui tam* action, notwithstanding the statute's clear directive that such an action may be dismissed only with the consent of the Attorney General. The court of appeals in *Killingsworth II* compounded the problem, foreclosing the government's attempt to intervene and prosecute this action on the basis of information obtained after the initial settlement was executed by the relator and the defendant. The combined effect of the court's rulings is to approve, over the Attorney General's objections, a $1.5 million settlement of claims for fraudulent practices against the United States when the government believes that the damage from those practices exceeded $110 million.

1. A. The False Claims Act authorizes a private person to bring an action "in the name of the Government" to seek civil remedies for fraud against the United States. 31 U.S.C. 3730(b)(1). Among the conditions placed upon the relator's right to bring suit on behalf of the United States is that a *qui tam* action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." *Ibid.* The unambigu-

ous import of Section 3730(b)(1) is that the consent of the Attorney General is an essential prerequisite to the voluntary dismissal of a *qui tam* action pursuant to a settlement between the relator and the defendant.[5]

B. The unambiguous language of Section 3730(b)(1) ought to have ended the court of appeals' inquiry. In addition, however, the Attorney General's right to veto a proposed dismissal is vital to the proper operation of the unusual but carefully balanced system of *qui tam* litigation developed by Congress. The False Claims Act's *qui tam* provisions reflect Congress's recognition that the government lacks the resources necessary to uncover, investigate, and pursue every instance of fraud against the United States. See S. Rep. No. 345, 99th Cong., 2d Sess. 7-8

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[5] The court of appeals' departure from the statutory text is highlighted by its crafting of hearing procedures that have no basis in that text. The Act expressly provides for a hearing when the government, having intervened to take over a *qui tam* suit, proposes to settle the action over the relator's objection. See App., *infra*, 26a. The statute contains no analogous hearing provision covering the situation in which the government objects to a settlement negotiated by the relator. *Ibid.* The court nevertheless construed the Act to provide that "when the government objects with good cause to a proposed settlement, it has a right to a hearing, as would an objecting relator." *Id.* at 29a-30a. The court was correct in concluding that it would be anomalous to afford the government *fewer* procedural safeguards than the relator, since a *qui tam* suit is based on fraud against the United States. The court failed, however, to draw the obvious inference: no hearing procedures are necessary or appropriate where the government objects to the private parties' settlement, because the consent of the Attorney General is an essential prerequisite to dismissal of a *qui tam* action.

(1986) (*1986 Senate Report*). The Act gives private relators a financial incentive to supplement the government's investigative and enforcement efforts. The premise of the *qui tam* mechanism is that the relator's self-interested pursuit of personal financial gain will ultimately contribute to the detection and remediation of fraud against the United States.

Precisely because the relator may seek to vindicate his or her own interests, rather than those of the United States, it is essential that the Attorney General have the power to prevent settlements between relators and defendants that result in dismissals detrimental to the public interest. For example, *qui tam* suits are often joined with causes of action personal to the relator—here, for example, a claim of wrongful discharge. Because any recovery under the False Claims Act must be shared with the government, see pages 3-4, *supra*, it is in the relator's interest to negotiate an agreement that allocates as large a percentage of the settlement amount as possible to the personal claim. The defendant has no incentive to object to such a misallocation, although it may cause substantial financial harm to the United States. Self-interest may also affect the scope of the release proposed by the defendant in a *qui tam* settlement. It is in the defendant's interest to receive the broadest possible release of liability for fraud or other actions involving the United States. At the same time, the relator has no incentive to limit the scope of the release. As a result, *qui tam* relators often agree to release the defendant from liability, not only with respect to the particular instances of fraud at issue, but also with respect to all possible claims arising out of a large, multi-faceted government contract. When the dismissal order incorporates the settle-

ment agreement, the dismissal of a *qui tam* action will generally preclude a subsequent suit brought by the government upon claims that have been released.[6] The effect of such a release and dismissal is to immunize the contractor from liability for fraud that has neither been investigated nor actually litigated. In the present case, for example, new evidence of very substantially broader fraud emerged after the settlement had been negotiated between the relator and the defendant.

The court of appeals construed Section 3730(b)(1) as requiring the Attorney General's consent to dismissal only during the initial 60-day period after a *qui tam* suit is filed, during which the government (pursuant to 31 U.S.C. 3730(b)(2)) has an unrestricted right to intervene to take over the litigation. See App., *infra*, 24a. That interpretation renders the consent provision virtually meaningless. During the initial 60-day period, a *qui tam* case remains under seal, and not even the defendant is aware of its existence. See 31 U.S.C. 3730(b)(2). Thus, under the court of appeals' holding, the consent provision will never apply to settlements between the relator and defendant; it would apply only where the *qui tam* relator decides to dismiss the action voluntarily before the government has made a decision whether to intervene. In such a case, however, the government normally does not need a provision requiring its consent in order to protect its interests, since a voluntary dismissal made before service of the defendant's

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[6] See *1986 Senate Report* at 27 ("if the Government declines to intervene in a *qui tam* action, it is estopped from pursuing the same action administratively or in a separate judicial action").

answer is without prejudice. See Fed. R. Civ. P. 41(a)(1).

As the court of appeals acknowledged, moreover, "[t]he language in the statute requiring both the government and the court to consent to a dismissal came from the initial *qui tam* statute of 1863." App., *infra*, 23a; see Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. Under the 1863 Act, the Attorney General's power to reject a proposed settlement and dismissal of *qui tam* litigation could not have been limited to the 60-day period after filing, since the statutory provision permitting intervention by the government during that period was not added to the Act until 1943. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608. The court of appeals concluded that the 1986 amendments to the statute had implicitly narrowed the Attorney General's right of veto. See App., *infra*, 23a ("The format and intent of the amended statute * * * do not preserve the government's absolute right to bar a dismissal * * *."). That reasoning is contrary both to the established rule that repeals by implication are disfavored, see, *e.g.*, *Matsushita Electric Industrial Co.* v. *Epstein*, 116 S. Ct. 873, 881 (1996), and to the legislative history of the 1986 amendments, which indicates that Section 3730(b)(1) "remains unchanged," *1986 Senate Report* at 23.

In light of the potential divergence between the interests of the relator and those of the United States, Congress reasonably determined that the relator should not be permitted to settle and dismiss the government's claims without the consent of the Attorney General. Congress expressed that intent unequivocally, stating that a *qui tam* action "may be dismissed only if the [district] court and the Attorney General give written consent to the dismissal." 31

U.S.C. 3730(b)(1). The requirement that the Attorney General consent to any dismissal, moreover, is vital to the protection of the governmental and public interests in the correct resolution of claims involving fraud against the United States. The Ninth Circuit's decision disregards the plain language of Section 3730(b)(1) and disrupts the operation of the *qui tam* system.

C. Contrary to the court of appeals' conclusion, other provisions of the False Claims Act do not cast doubt on the plain meaning of Section 3730(b)(1). The court of appeals found the government's asserted power to veto a False Claims Act settlement to be "contradictory to the express language of [31 U.S.C.] § 3730(b)(4)(B), which gives the *qui tam* plaintiff 'the right to conduct the action.'" App., *infra*, 24a. There is, however, no basis for the court's assertion that "[t]he right to conduct a *qui tam* action obviously includes the right to negotiate a settlement in that action." *Ibid.* Rather, the relator's right to "conduct the action" is subject to the limitations set forth in other provisions of the statute, including Section 3730(b)(1)'s statement that the action can be dismissed only with the consent of the Attorney General. The court also erred in relying (see App., *infra*, 24a) upon 31 U.S.C. 3730(d)(2), which provides that, if the government does not intervene in a *qui tam* action, "the person bringing the action or settling the claim" shall receive a specified percentage of the United States' recovery. See pages 3-4, *supra*. Section 3730(d), entitled "Award to Qui Tam Plaintiff," establishes the percentage of the total award to which the relator is entitled. It makes clear that the relator is entitled to the same percentage whether the case is settled or proceeds to a final judgment on the merits.

Nothing in that Section, however, purports to override Section 3730(b)(1)'s clear provision that the consent of the Attorney General is a necessary prerequisite to settlements that result in dismissal.

The court in *Killingsworth I* also suggested that the Attorney General's assertion of a veto power over a proposed dismissal represented an attempt to force the relator and the defendant to continue the litigation against their will. App., *infra*, 24a-25a. That concern is illusory. As a practical matter, the Attorney General's right to disapprove a settlement will not force the parties to litigate against their will if the government declines to intervene and prosecute the action. Both the relator (for financial reasons) and the defendant (to obtain a dismissal with prejudice) retain substantial incentives to revise the settlement to address the Attorney General's concerns. Because the United States will receive a large majority of any False Claims Act recovery, the Attorney General has no interest in rejecting a reasonable settlement and allowing a case to languish. It is therefore in the interests of the relator, the defendant, and the Attorney General to revise a proposed unacceptable settlement and craft a new one.

Even under the court of appeals' theory, moreover, the settlement of a *qui tam* action may not be approved if the district court finds that the Attorney General's objections have merit or that the settlement is otherwise improper. See App., *infra*, 29a-30a. Thus, the court of appeals' approach does not eliminate the possibility that the lawsuit will continue despite the parties' desire to settle it, nor does it obviate the need for approval of the agreement by someone other than the relator and defendant. The question is simply whether the settling parties must

obtain the consent of both the district court and the Attorney General, or of the district court alone. The requirement that the consent of both the court and the United States be obtained is clear from the text of the statute. 31 U.S.C. 3730(b)(1).[7]

2. The problems created by the Ninth Circuit's holding in *Killingsworth I* were compounded by the court's decision in *Killingsworth II*. The court in *Killingsworth I* held that the Attorney General has two options when faced with a settlement that is against the interest of the United States: (1) attempt to intervene for "good cause" under 31 U.S.C. 3730(c)(2)(D)(3), or (2) raise objections to the settlement at a hearing. See App., *infra*, 28a. On remand, the government sought to exercise the first option by intervening in order to prosecute the action in light of new evidence of what now appears to have been

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[7] The Second Circuit has stated that once the United States has declined to intervene in an action, "little rationale remains for requiring consent of the Attorney General before an action may be dismissed." *Minotti* v. *Lensink*, 895 F.2d 100, 104 (1990). *Minotti* involved an *involuntary* dismissal by a district court rather than a voluntary dismissal by the relator. The court in that case did not hold that the consent provision applies only during the initial 60-day intervention period, but that the consent provision applies "only in cases where a plaintiff seeks voluntary dismissal of a claim or action brought under the False Claims Act, and not where the court orders dismissal." *Id.* at 103; see *United States ex rel. McGough* v. *Covington Technologies*, 967 F.2d 1391, 1397 (9th Cir. 1992) (distinguishing *Minotti*). Where a court dismisses a *qui tam* action on the merits, we agree that Congress did not intend to require the Attorney General's consent. Where the relator attempts to dismiss the case voluntarily, however, Congress concluded that the Attorney General's consent is necessary to protect the interests of the United States.

extensive fraud, and the broad release in the parties' agreement that would otherwise prevent the future use of that evidence. The government also relied on that evidence in arguing that a settlement of $1.5 million on the FCA count was seriously inadequate. The district court refused to consider the intervention request and reaffirmed the settlement, holding that new evidence provides no basis for disapproving a settlement entered into by the relator and the defendant. *Id.* at 8a. The court of appeals affirmed that decision, leaving intact the district court's holding that the reasonableness of the settlement depends solely on the evidence existing when the agreement was executed, rendering newly discovered evidence irrelevant.

The disposition of *Killingsworth II* reflects a fundamental error. The False Claims Act gives the United States the right to intervene *at any time* "upon a showing of good cause." 31 U.S.C. 3730(c)(3). The discovery of new evidence of fraud is precisely the type of situation that Congress intended to constitute "good cause." *1986 Senate Report* at 26-27. The effect of the *Killingsworth II* holding is to limit the government to the discovery conducted by the relator up to the point of a settlement proposal—even if the relator's efforts were inadequate or the defendant improperly withheld evidence during discovery. Because the government often does not have an opportunity to evaluate the evidence until it is asked to review a proposed settlement, that holding, coupled with the holding that the government has no right to veto a settlement, will severely interfere with the

government's efforts to prevent improper settlements in *qui tam* cases.[8]

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[8] The court of appeals erred in holding (App., *infra*, 5a n.2) that the government's request to intervene was not properly before the district court. The court acknowledged that the government had sought to intervene early in the hearing and that the district court had declined to address that request. Because the government "did not attempt to resurrect the motion at some later point in the remand hearing," the panel reasoned, that motion was never properly before the district court. *Ibid.*

The court's reasoning is unpersuasive. Having made an intervention request and been told in no uncertain terms by the district court that that request would not be considered, the government was under no obligation to "resurrect" the motion. Indeed, the orderly conduct of district court litigation would be substantially impaired if parties were encouraged or required repeatedly to raise already-rejected arguments. In any event, the government did make clear that it had not abandoned the intervention request. Government counsel reiterated, near the end of the hearing, that the Department of Justice wished to take over the litigation, see 94-56599 C.A. E.R. 88, 89 (transcript of proceedings), and the government filed a written motion to intervene after the hearing was concluded but before judgment was entered. See App., *infra*, 5a n.2.

The court of appeals was also incorrect in criticizing the government for failing to conduct discovery in 1993, when Killingsworth first obtained the new evidence. See App., *infra*, 6a n.3. The court based its criticism on its understanding that the government "was aware of the alleged new evidence since 1993." *Ibid.* That statement was based on the government's representation that Killingsworth had briefly shown some of the pertinent documents to an Assistant United States Attorney in 1993, during the pendency of the *Killingsworth I* appeal. See note 3, *supra*. As noted above, see note 3, *supra*, the Assistant United States Attorney has since informed us that he did not see the documents in question until July, 1994. Even if our earlier representation is taken as true, however, there is no basis for the court's suggestion that the government

3. The Ninth Circuit panel in the instant case was the first court of appeals to address the question whether the Attorney General possesses a right to prevent the voluntary dismissal of a *qui tam* action brought under the FCA. No circuit conflict exists on the issue. This Court's review is warranted, however, even in the absence of a conflict among the circuits.

A. Department of Justice records show that 1386 *qui tam* cases have been filed since the 1986 amendments to the False Claims Act. Of those, 458—approximately 33%—were filed within the Ninth Circuit. Because many major defense contractors are located within the Ninth Circuit, moreover, a disproportionate percentage of the larger *qui tam* cases are also brought there. By depriving the Attorney General of the right to prevent unreasonable *qui tam* settlements, the court of appeals' rulings in this case will have an immediate and serious impact on a large portion of existing and future *qui tam* litigation.

B. The government's ability effectively to monitor *qui tam* litigation in a manner that safeguards the public interest depends on the existence of clear legal rules delineating the scope of the Attorney General's authority. The answer to the question whether the Attorney General has the right to veto a *qui tam*

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failed to seek discovery in a timely fashion. The government could not have conducted formal discovery at a time when the case had been dismissed with prejudice and was pending on appeal in the Ninth Circuit. The case was remanded to the district court in June, 1994, and the United States received copies of the documents the following month. Government counsel promptly investigated the matter anew, informing the district court in August, 1994, that the Department of Justice wished to take over the litigation.

dismissal provides one of the basic ground rules under which the *qui tam* system operates. The doubts about the scope of the Attorney General's power created by the decision below will substantially complicate the process of negotiation and settlement of *qui tam* cases nationwide.

If the Attorney General does *not* possess a veto power, moreover, she must devise alternative mechanisms for addressing the danger that settlements between private parties will deprive the government of an adequate recovery in cases of fraud against the United States. If the decision below is correct, the Attorney General will be required to protect the government's interests by intervening in an increased number of cases. Such intervention requires a substantial expenditure of government resources. Prompt resolution of the issue by this Court will greatly assist the Attorney General in determining when intervention will be necessary in order adequately to protect the public interest in preventing collusive or otherwise inadequate settlement agreements.

C. Finally, the combined effect of the two Ninth Circuit rulings in this case is to threaten to immunize a very substantial degree of fraud from False Claims Act litigation. Despite newly discovered evidence showing potential fraud in this case in excess of $110 million, the district court and the court of appeals have upheld a False Claims Act settlement of only $1.5 million. The settlement and dismissal in this case plainly disserve the interests of the people of the United States and the purposes of the False Claims Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1996

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-56599
D.C. No. CV-88-6635-TJH

UNITED STATES OF AMERICA, EX REL.
MAX KILLINGSWORTH, PLAINTIFF-APPELLANT

vs.

NORTHROP CORPORATION,
DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
TERRY J. HATTER JR., District Judge, Presiding

Submitted October 17, 1995 *
Pasadena, California

[Filed October 26, 1995]

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. 34(a); 9th Cir. R. 34-4.

MEMORANDUM**

Before: POOLE and O'SCANNLAIN, Circuit Judges, and MARQUEZ,*** District Judge

This case is before this court for a second time. Following the first appeal, we remanded this case to the district court for a finding regarding the fairness and reasonableness of the proposed settlement. *United States ex rel. Killingsworth* v. *Northrop Corp.*, 25 F.3d 715, 723 (9th Cir. 1994) (*Killingsworth I*). The government contends that on remand the district court erred by: (1) refusing to consider newly discovered evidence which allegedly undermines the fairness of the proposed settlement; and (2) failing to hold an evidentiary hearing. Whether the district court complied with our remand mandate is a question of law which we review de novo. *See, e.g.*, *United States* v. *McConney*, 728 F.2d 1195, 1202 (9th Cir.) (en banc) (questions of law reviewed de novo), *cert. denied*, 469 U.S. 824 (1984). We affirm.[1]

In the first appeal, the government contended that, despite its refusal to previously intervene in the action, it had an absolute right under the False Claims Act, 31 U.S.C. § 3730 (FCA), to block the proposed settlement between Killingsworth and Northrop. *See*

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

*** The Honorable Alfredo C. Marquez, Senior United States District Judge for the District of Arizona, sitting by designation.

[1] We need not repeat the underlying facts which are set forth in *Killingsworth I*.

Killingsworth I, 25 F.3d at 720. The government argued that the proposed settlement—$1.5 million for the FCA claim and $2.7 million to Killingsworth for his wrongful termination claim and attorneys' fees—reflected a deliberate attempt by Killingsworth and Northrop to allocate the funds in such a manner to deprive the government of its fair share. *See id.*

We rejected the government's contention that it had an absolute right to block the settlement. *See id.* at 723. Nevertheless, we concluded that, "when the government objects with good cause to a proposed settlement, it has a right to a hearing, as would any objecting relator . . . ." *See id.* at 725. In June 1994, our mandate issued and we remanded the case to the district court with the following instruction:

> [T]he district court should hold a hearing to determine whether the proposed settlement fairly and reasonably allocates the settlement funds. If the district court approves the settlement, it may dismiss the case. On the other hand, if the district court finds that the amount to be paid to Killingsworth and his counsel is not a fair appraisal of the value of his case and services rendered by his counsel, it may disapprove the settlement as structured. In the latter instance, the parties are entitled to continue with litigation.

Id. at 725.

During the pendency of the first appeal in 1993, Killingsworth allegedly obtained access to additional Northrop documents which indicated more extensive fraud by Northrop than originally determined. Killingsworth provided copies of the new documents to an Assistant United States Attorney in 1993.

Subsequently, Northrop filed a motion to reaffirm the settlement. Arguing that the amount of the settlement for the FCA claim was inadequate based upon the newly discovered evidence, the government filed an opposition to Northrop's motion. Killingsworth sent copies of the new evidence to the Justice Department in July 1994.

At the remand hearing on August 22, 1994, the government requested a continuance to file a motion to intervene and to litigate the matter based upon the alleged newly discovered evidence showing more extensive fraud than contemplated by the proposed settlement. The government argued that the court should address the motion to intervene before determining the reasonableness of the settlement. The government also represented that it would consent to the settlement if the dismissal of the action was without prejudice to the government.

The court rejected the government's argument because it believed that, based upon our remand order, the government first had to show good cause for objecting to the settlement before being allowed to intervene and to litigate further the matter. The court then denied the government's continuance motion and gave the parties an opportunity to address the reasonableness of the settlement. Following the parties' arguments, the court made the following ruling:

> [H]aving read the government's papers and now having had a hearing as instructed by the Ninth Circuit, [I'm] going to reaffirm that settlement agreement . . . . You know, in settlements not everybody is happy. Usually no one, if it's a successful settlement, ought to be completely happy,

> but indeed satisfied. And that is the case here. Anything can occur afterwards, all kinds of evidence can come out. That's one of the purposes of having a settlement, to indeed keep us from having to go through a lengthy further discovery, trial itself, other kinds of matters. So I'm going to reaffirm the settlement agreement . . . .

On September 9, 1994, the district court entered a written order reaffirming the settlement and dismissing the case with prejudice.[2]

We hold that the court properly determined the reasonableness and fairness of the proposed settlement. Our mandate merely required the district court to hold a hearing on whether the government's objections to the proposed settlement rested on good cause—i.e., whether Killingsworth and Northrop colluded to shift the majority of the settlement funds to Killingsworth's personal claim and attorney's fees-thereby depriving the government of its fair share. Nothing more was required.

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[2] On August 24, 1994, the government attempted to file a motion to intervene which the clerk's office for the Central District of California refused to accept based upon the district court's reaffirmance of the settlement. The government argues that the clerk's return of the motion is tantamount to a denial of the motion, and, therefore, appealable. We reject this argument as nonsensical. Although the government initially raised its motion for intervention before the district court, the judge declined to address it. The government did not attempt to resurrect the motion at some later point in the remand hearing. The motion therefore was never properly before the district court and we decline to address it for the first time on appeal. *See e.g., Sablan* v. *Dept. of Fin. of N. Mariana Islands*, 856 F.2d 1317, 1327 (9th Cir. 1988). Accordingly, we deny as moot Northrop's motion for partial dismissal of appeal.

On remand, however, the government sought to introduce new evidence allegedly undermining the fairness of the proposed settlement. The district court did not err by refusing to consider the alleged new evidence relating to other issues before determining whether the government had good cause for objecting to the proposed settlement in light of our limited remand. *See Killingsworth I*, 25 F.3d at 725. No language in our remand order required the district court to hear new evidence at an *evidentiary* hearing. *See id.* Having reviewed the parties' briefs and entertained arguments, the court properly followed our remand order.[3]

AFFIRMED.

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[3] We reject the government's contention that the district court abused its discretion by reaffirming the settlement without allowing additional time for discovery. The government concedes that it was aware of the alleged new evidence since 1993; thus, the government failed to conduct discovery between its receipt of such evidence in 1993 and the court's dismissal of the action in August 1994. Under such circumstances, the court properly refused the government's eleventh-hour discovery request. *See, e.g., Sopcak* v. *Northern Mountain Helicopter Service*, 52 F.3d 817, 819 (9th Cir. 1995).

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 88-6635 TJH (Ex)

UNITED STATES, EX REL.
MAX KILLINGSWORTH, PLAINTIFFS

v.

NORTHROP CORPORATION,
A CALIFORNIA CORPORATION, DEFENDANT

ORDER OF THE COURT GRANTING NORTHROP'S MOTION TO REAFFIRM SETTLEMENT

Aug. 22, 1994
[Entered Sept. 9, 1994]

Ctrm: Honorable TERRY J. HATTER

Northrop Corporation's ("Northrop") Motion to Reaffirm Settlement in the above-captioned matter came on for hearing before this Court on August 22, 1994. Having considered the pleadings, written and oral argument of relator Max Killingsworth and counsel for each of the interested parties, and the evidence offered by the interested parties, this Court finds as follows:

(1) Applying the standards set forth by the Ninth Circuit Court of Appeals in its Opinion and Order in *United State ex rel. Killingsworth v. Northrop*

Corporation, Case No. 92-55863, ____ F.3d ____, rendered May 23, 1994, this Court finds that the settlement agreement entered into between Northrop and Killingsworth in April 1992 (the "Settlement") was fair, adequate and reasonable under all the circumstances. This Court further finds that the government's allegations that Northrop and Killingsworth colluded to "allocate" the proceeds of the Settlement so as to deprive the government of its fair share of the proceeds are not supported by the evidence. The Settlement was negotiated by competent counsel at arms-length, and the amounts payable to Killingsworth and his counsel are a fair appraisal of the value of his case and services rendered by his counsel; and

(2) The contention that "new" evidence supposedly discovered in 1993 renders the settlement amount referable to the False Claims Act claims less desirable now than when entered into affords no basis for setting aside the Settlement, given the Settlement's consensual nature and the strong public policy favoring settlement and finality in litigation. One of the very reasons settlements are entered into is to account for, and preclude, the risk that subsequent developments may prove helpful or harmful to either of the litigants.

ACCORDINGLY, IT HEREBY IS ORDERED that Northrop's Motion to Reaffirm Settlement be granted, that the Settlement be affirmed, and that

this case be dismissed in its entirety with prejudice as to both Killingsworth and the United States.

* * *

IT IS SO ORDERED.

Dated: Sept. 6, 1994 /s/ TERRY J. HATTER, JR.
TERRY J. HATTER, JR.
District Court Judge

Presented by:

MUNGER, TOLLES & OLSON
Brad D. Brian
Terry E. Sanchez
Marc T.G. Dworsky

By /s/ Marc T.G. Dworsky
MARC T.G. DWORSKY

Attorneys for Defendant
NORTHROP CORPORATION

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55863

UNITED STATES OF AMERICA, EX REL., APPELLANT,
MAX KILLINGSWORTH, PLAINTIFF-APPELLEE

v.

NORTHROP CORPORATION, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF
CALIFORNIA

Argued and Submitted June 11, 1993
Argued and Submitted on Petition for Rehearing
March 14, 1994
Opinion Filed Jan. 19, 1994
Opinion Withdrawn May 23, 1994

Filed May 23, 1994

ORDER

Before: BROWNING, BRIGHT* and TANG, Circuit Judges

Opinion by Senior Circuit Judge BRIGHT

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* Honorable Myron H. Bright, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

The petition for rehearing filed February 2, 1994, is granted. Upon hearing further oral argument and examining supplementary briefs and other materials, the prior opinion of this court filed January 19, 1994, is withdrawn. A revised opinion is attached to this order and is filed as the opinion of this court in this case.

OPINION

BRIGHT, Senior Circuit Judge:

Max Killingsworth brought a *qui tam* action against the Northrop Corporation [Northrop], alleging it defrauded the United States by inflating cost estimates used to support MX missile contract proposals. During an extended course of litigation, the United States declined to exercise its right to intervene under §§ 3730(b)(2) and (c)(3) of the False Claims Act, 31 U.S.C. § 3730 [the Act]. Killingsworth and Northrop eventually agreed to a settlement, notified the United States, and moved to dismiss the action. The United States objected to the settlement but still declined to intervene in the proceedings. The district court ultimately dismissed the action without the consent of the United States. The United States then moved in the district court to intervene for purpose of appeal, seeking to challenge the stipulated dismissal. The district court denied the motion.

The United States brings this appeal, asserting the district court erred in dismissing this *qui tam* action without the consent of the Attorney General and in denying the government the right to intervene on appeal. We reverse and remand this case for further proceedings consistent with this opinion.

I.

In November of 1988, Max Killingsworth, a former employee of Northrop, filed this action against Northrop under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730. He alleged Northrop improperly inflated cost estimates supporting MX missile contract proposals. After investigating the allegations for almost eighteen months, the government informed Killingsworth it would not exercise its right under § 3730(b)(4)(A) of the Act to take over the litigation.

Northrop and Killingsworth agreed on a settlement of $500,000, but in May of 1990, the settlement fell through after a dispute over several issues, including fees for Killingsworth's attorneys. Killingsworth obtained new counsel and amended his complaint, adding additional claims, including one that Northrop wrongfully terminated his employment. In June of 1990, the district court entered an order which recognized the government's decision not to intervene and required that "the consent of the Attorney General . . . be solicited before the granting of a dismissal, settlement, or other discontinuation of this action." (Order re Election by the United States Declining Intervention and the Unsealing of Complaint filed June 7, 1990, at 2.)

In December of 1991, Killingsworth and Northrop entered into another agreement to settle the case. The agreement provided that Northrop would pay $1 million for the False Claims Act claim and $3.2 million for Killingsworth's wrongful termination claim including attorneys' fees and costs. Northrop conditioned its participation in the agreement on the government's approval.

For several months, the government discussed the proposed settlement with Killingsworth and Northrop, expressing concern that the bulk of the settlement money would go to the wrongful termination claim. The government thought that the parties might have specifically structured the settlement so as to reduce the amount the government realized; normally entitled to roughly seventy percent of any False Claims Act settlement under 31 U.S.C. § 3730(d)(2), the government would not receive any compensation from the wrongful termination claim. The government further asserted that Northrop failed to pursue a statute of limitations defense to the wrongful termination claim which could have shielded Northrop from liability on that claim.

On March 4, 1992, Killingsworth moved to have the district court approve the settlement and dismiss the case. On March 20, 1992, Northrop filed a statement of nonopposition. The government formally objected to the settlement on April 3, 1992, but still declined to intervene in the action.

Northrop and Killingsworth then reopened settlement discussions, and on April 16, 1992, agreed to shift $500,000 from the wrongful termination claim to the False Claims Act claim. In sum, Northrop would pay $1.5 million on the False Claims Act claim and $2.7 million on Killingsworth's wrongful termination claim and attorneys' fees. On April 20, the district court ordered the government to inform the parties whether it consented to the settlement and, if not, to file a motion seeking leave to intervene in the case.

On May 4, the government informed the district court it did not consent to the district court's dismissal of the action, but again declined to file a motion

to intervene. On May 19, 1992, the district court entered its order of dismissal with prejudice, stating:

> [T]he Attorney General's consent to dismissal is not required in the present circumstances, and that the instant action is dismissed in its entirety with prejudice to both the *qui tam* plaintiff and the United States.

(Corrected Joint Stipulation of Dismissal; Proposed Order Thereon filed May 19, 1992, at 3.)

The government filed a motion seeking leave to intervene for purpose of appeal on May 21, 1992. The district court denied the motion without opinion on June 16, 1992. The government then filed this timely appeal from the district court's dismissal of the action and denial of leave to intervene for purpose of appeal.

II.

The government first contends the district court erred in denying as untimely its motion to intervene for purpose of appeal. It argues that under Fed.R. Civ.P. 24(a) and the Act, it has the right to intervene at this point in the action. Northrop and Killingsworth counter that the failure of the government to intervene in the action at any time prior to the district court's approval of the settlement leaves the parties free to carry out the terms of the settlement and move to dismiss the action.

We review de novo the district court's denial of the government's motion to intervene as a matter of right. *United States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1393-94 (9th Cir.1992).

The government has attempted to intervene for purpose of appeal under Fed.R.Civ.P. 24(a), Interven-

tion of Right. This court recently permitted intervention under somewhat similar circumstances in *McGough*. In our opinion, *McGough* also controls here and we conclude the government may intervene for purpose of appeal.

In determining whether a party may intervene as of right under Fed.R.Civ.P. 24(a), we apply a four-part test inquiring whether:

> (1) the applicant's motion is timely;
>
> (2) the applicant has asserted an interest relating to the property or transaction which is the subject of the action;
>
> (3) the applicant is so situated that without intervention the disposition may, as a practical matter, impair or impede its ability to protect that interest; and
>
> (4) the applicant's interest is not adequately represented by the existing parties.

McGough, 967 F.2d at 1394 (quoting *Orange County v. Air California*, 799 F.2d 535, 537 (9th Cir.1986), cert. denied, 480 U.S. 946, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987)).

Northrop maintains that the circumstances of the government's motion for leave to intervene for appeal differ from those in *McGough*, because in that case the government was unaware of the proposed settlement until after the district court approved it and ordered the action dismissed. Northrop argues that here the government's motion was not timely because it was aware of the settlement as early as December of 1991 and was informed of the discussions over the ensuing months and failed to intervene during that

period. Northrop argues that the government not only delayed intervention until the expiration of lengthy settlement negotiations, but also disregarded a district court order to intervene or consent to dismissal.[1]

We review the district court's determination that the motion to intervene was untimely under the abuse of discretion standard. *McGough*, 967 F.2d at 1393-94. In determining whether the motion was timely, we consider three factors:

(1) the stage of the proceeding at which an applicant seeks to intervene;

(2) the prejudice to the other parties; and

(3) the reason for and length of the delay.

McGough, 967 F.2d at 1394 (quoting *Air California*, 799 F.2d at 537).

Generally, the court will consider a post-judgment motion to intervene to be timely if filed within the time limitations for filing an appeal. *Yniguez v. Arizona*, 939 F.2d 727, 734 (9th Cir.1991). Here, the government promptly filed its motion after the dismissal of the case with prejudice and thus seeks to intervene for purpose of appeal at an appropriate stage of the proceedings, complying with the first factor of the timeliness test.

The consideration of the motion at this point is not unduly prejudicial to the rights of Killingsworth or

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[1] Prior to dismissing the case, the district court had ordered the government either to consent to the dismissal or to file a motion to intervene. (Tr. of Apr. 20, 1992 Hearing, at 10-11). The government failed to comply with the district court's order.

Northrop, as the passage of time does not significantly worsen their positions. See *United States v. Oregon*, 913 F.2d 576, 588-89 (9th Cir.1990), *cert. denied*, 501 U.S. 1250, 111 S.Ct. 2889, 115 L.Ed.2d 1054 (1991). The government thus complies with the second factor of the test.

Finally, the timeliness test requires an acceptable reason for the delay in filing the motion. The government argues it delayed intervening at the district court level because it sought to avoid the burdens of a litigant, such as discovery, and because of possible *res judicata* effects. It maintains it intervened as soon as possible for purpose of appeal.

It is true that the government had the opportunity to intervene before the district court made its ruling adopting the settlement and dismissing the action. Nevertheless, the district court and the parties seemed to presume the government must intervene formally and become a litigant in the action in order to object at that stage. This would explain why the district court, accepting the government's statement that it did not wish to become a party in the action, ruled that the government had no standing to object to the settlement.

We now reject the district court's reasoning.[2] The statutory scheme of the False Claims Act provides protection for the rights of both the relator and the government. It is clear, however, that in a qui tam action, the government is the real party in interest. *United States ex rel. Milam v. University of Texas*

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[2] We are cognizant of the fact that the statutory scheme at issue here is unique in the law. We also recognize that the precise issue before us now has not yet been adjudicated in the federal courts.

M.D. Anderson Cancer Ctr., 961 F.2d 46, 50 (4th Cir.1992) ("United States is the real party in interest in any False Claims Act suit, even where it permits a *qui tam* relator to pursue the action on its behalf"). Recently, this court cited with approval an interpretation of the Act which permits the government to move for dismissal of some but not all defendants in a *qui tam* action without actually intervening in the case. *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 753 n. 10 (9th Cir.1993) (citing *Juliano v. Federal Asset Disposition Ass'n*, 736 F.Supp. 348 (D.D.C.1990), *aff'd*, 959 F.2d 1101 (D.C.Cir.1992)). Although the issues presented in *Kelly* and *Juliano* differ substantially from those now before us, these cases support the government's right to standing here. As such, we conclude that the government has a right, with or without formal intervention, to ask the court to review a settlement for the purpose of determining whether the provisions of the settlement violate the False Claims Act by improperly allocating to the relator funds which should be paid to the government. See Part IV, *infra*.

As the government was denied a proper hearing before the district court and moved to intervene for purpose of appeal as soon as possible, we conclude the district court abused its discretion in finding the government's motion to be untimely. As the instant case is otherwise indistinguishable from McGough, we hold that the district court erred in denying the government's motion to intervene in a limited way for the purpose of appeal and we therefore proceed with the merits of the case.

III.

The government contends the district court erred in dismissing the action without the consent of the Attorney General, in contravention of its absolute right under the Act to block a settlement. The government's concern about the settlement derives from Northrop's agreement to pay Killingsworth $2.7 million to settle his wrongful termination claim and compensate his attorneys. The government argues that the proposed settlement reflects a deliberate attempt by Northrop and Killingsworth to divert money from the False Claims Act claim to Killingsworth's personal claim. The government further contends Northrop's failure to assert a statute of limitations defense to bar Killingsworth's personal claim brings into question the propriety and validity of the settlement. The government asserts that *McGough* gives it an absolute right to block the settlement and argues that under *McGough* and the plain terms of the False Claims Act, *qui tam* actions may not be voluntarily dismissed over the objection of the Attorney General.

Northrop counters that earlier in the litigation, the government was free to intervene, noting that the district court in fact encouraged the government to intervene and take over the litigation. Northrop maintains that having chosen not to intervene earlier, the government cannot now block the settlement and force Killingsworth to litigate against his will.

The substantive issue in this case—whether the district court erred in dismissing the action without the consent of the government—requires the interpretation of § 3730(b)(1) and is subject to de novo review. *Anderson v. United States*, 966 F.2d 487, 489

(9th Cir.1992). In resolving the difficult and novel question presented by this appeal, we carefully review the provisions of the False Claims Act outlining the interrelationship of the *qui tam* plaintiff and the government.[3]

To place the contested provision in an appropriate context, we first examine the legislative history of the Act. The government's role in a False Claims Act action initiated and pursued by a private party has changed over the years. Under the original statute enacted in 1863, the government had no right to take over an action commenced by a *qui tam* plaintiff. *See* Act of March 2, 1863, ch. 67, 12 Stat. 696; *United States v. Griswold*, 30 F. 762 (C.C.Or.1887). In 1943,

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[3] Because of the novelty and complexity of the statutory issues in this case, we asked the parties to brief two additional issues not presented by the government or the parties in their briefs on appeal: (1) Assuming 31 U.S.C. § 3730(b)(1) is inapplicable: If the government does not formally intervene, does it have standing to object to the proposed settlement on grounds that the settlement allocates the proceeds among multiple claims in a way that deprives the government of its legitimate share under 31 U.S.C. § 3730(d)(2); and (2) If the government does have standing to object to the proposed settlement, to what extent does the trial court have the power to reallocate the settlement proceeds among the various claims. See Order of this court filed September 22, 1993. Additionally, after the government filed a petition for rehearing following publication of our slip opinion on January 19, 1994, we granted the parties additional oral argument held March 14, 1994, in San Francisco, California.

Responding to question one, the government asserts that it does not have to intervene formally to object to a settlement; Northrop and Killingsworth share the contrary view that the government must intervene formally to object. The government, Northrop, and Killingsworth agree that the district court has no power to reallocate settlement proceeds.

the Act was amended to give the government sixty days at the outset of the suit to examine the case and, at its option, proceed with the action within the sixty-day period. *See* Pub.L. No. 78-213, ch. 377, 57 Stat. 608 (1943), (codified at 31 U.S.C.A. § 3730(b)(2)(A) (West 1982)). In 1986, the Act was further amended, giving the government the ability to extend the sixty-day examination period upon a showing of good cause. *See* Pub.L. No. 99-562, 100 Stat. 3154 (1986) (codified at 31 U.S.C.A. § 3730(b)(3) (West Supp.1988)). The amended Act also enabled the government to intervene in the action after the expiration of the sixty-day period upon a showing of good cause. *Id.* at § 3730(c)(3).

The legislative history of the 1986 amendments illuminates the reasoning behind these amendments and undermines the government's claim of an absolute right to block a settlement. The Senate Report accompanying the proposed legislation stated that Congress' "overall intent" was "to encourage more private enforcement" of the Act. S.Rep. No. 345, 99th Cong., 2d Sess. 23-24 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-89. The amended Act "increases incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government." *Id.* at 2; 5267. In the debate on the House version of the bill, Representative Brooks spoke of enhancing "the ability of the citizen who brings such a suit to follow through with the litigation." 132 Cong.Rec. H6474, H6479 (1986). According to the Senate Report, the new provision permitting intervention after the sixty-day examination period was added to expand the "limited opportunity for Government involvement" and provide the government the option of intervening in "situations where new and

significant evidence is found" after the government initially declines to intervene. S.Rep. No. 345, 99th Cong., 2d Sess. 26-27 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291-92.[4] We conclude that Congress' intent to place full responsibility for False Claims Act litigation on private parties, absent early intervention by the government or later intervention for good cause, is fundamentally inconsistent with the asserted "absolute" right of the government to block a settlement and force a private party to continue litigation.

The government cites an express provision of the Act to bar the *qui tam* action from being voluntarily dismissed over the objections of the Attorney General. The government relies on Section 3730(b)(1), which states:

> A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

Section 3730(b)(1), however, has limited application[5] and must be read in conjunction with § 3730(b)(2), which gives the government an election "to intervene

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[4] This court reviewed the operative provisions of the Act in *United States ex rel. Kelly v. Boeing Company*, 9 F.3d 743 (9th Cir.1993).

[5] In some circumstances, the government's consent to a dismissal is not required. These situations include court-ordered dismissals and other involuntary dismissals. *See Minotti v. Lensink*, 895 F.2d 100 (2d Cir.1990) and *United States ex rel. Laughlin v. Eicher*, 56 F.Supp. 972 (D.D.C.1944).

and proceed with the action within 60 days after it receives both the complaint and the material evidence and information," and § 3730(c)(3), which provides that the government may intervene "at a later date [after the sixty days] upon a showing of good cause."

The term "intervention" as used in § 3730(b)(2) is accompanied by the phrase "and proceed with the action" and thus the intervention refers to the government's privilege of interceding and becoming a litigant in the action within the sixty days. Here, the government has declined to intervene for the purpose of proceeding with the action. Its appeal expressly states it is objecting to the settlement but does not contemplate taking over or participating in any action should the settlement fail to materialize.

The language in the statute requiring both the government and the court to consent to a dismissal came from the initial *qui tam* statute of 1863. The format and intent of the amended statute, however, do not preserve the government's absolute right to bar a dismissal without intervention except during the first sixty days plus any extension granted after the private person has filed a *qui tam* complaint. Section 3730(b) must be read as a whole. The private person bringing the action must provide full information to the government while the complaint is held in camera under seal for at least sixty days. During this time period, the government may elect to intervene and proceed with the action. § 3730(b)(2). The government for good cause may seek an extension of the sixty-day period while the action remains sealed. § 3730(b)(3). Finally, before the end of the sixty-day period or any extensions, the government shall either proceed with the action or notify the court that it declines to take over the action. § 3730(b)(4). In the latter case the

private person bringing the action shall have the right to conduct the action. § 3730(c)(3).

Thus, the consent provision contained in § 3730(b)(1) applies only during the initial sixty-day (or extended) period. Of course, if the government for good cause exercises its right to intervene at a later date, *see* § 3730(c)(2)(D)(3), its ability to control the litigation arises from its posture as an intervenor.

Further, the government's argument—that without intervention it possesses an absolute right to reject a proposed settlement at any time and for any reason—must be rejected as contradictory to the express language of § 3730(b)(4)(B), which gives the *qui tam* plaintiff "the right to conduct the action." The right to conduct a qui tam action obviously includes the right to negotiate a settlement in that action. Section 3730(d)(2), which provides for the proper allocation of *qui tam* proceeds, confirms the relator's right to settle the action if the government declines to intervene: "If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages." § 3730(d)(2) (emphasis added).

Finally, the government's assertion of an absolute right to block a settlement and dismissal by withholding its consent may represent a meaningless privilege in terms of present-day *qui tam* litigation. Here neither the government nor the relator desires to engage in further litigation. If the parties settle the action without a dismissal and thereby effectively stop litigating the case, the trial court would un-

doubtedly dismiss the suit for failure to prosecute.[6] *See* cases cited, *supra*, n. 5. Conversely, the government may not force Killingsworth and Northrop to continue litigation by refusing to consent to a settlement. *See United States ex rel. Truong v. Northrop Corp.*, 728 F.Supp. 615, 622 (C.D.Cal.1989); *United States ex rel. Stillwell* v. *Hughes Helicopters, Inc.*, 714 F.Supp. 1084, 1093 (C.D.Cal.1989).

Additionally, the government relies on *McGough*, 967 F.2d 1391, to support its alleged right to block any settlement. We held in *McGough* that the government's initial decision not to intervene was not equivalent to a consent to dismissal. *Id.* at 1397. Here, in contrast, we address a question not raised in *McGough* and hold that the government's consent to dismissal is only required during the initial sixty-day (or extended) period in which the government may decide whether to intervene. Moreover, in *McGough*, the government received no notice of the settlement and thus had no opportunity to intervene or object to the settlement. *McGough* cannot be construed to give the government an absolute right to bar a proper settlement where it has had notice of that settlement and where it has declined to take any action.

Thus, we reject the government's construction of the consent to dismissal language of § 3730(b)(1).

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[6] This result would almost certainly occur in *United States ex rel. Gibeault v. Texas Instruments*, 25 F.3d 725 (9th Cir.1994), decided contemporaneously with this case. In that case the sole remaining issue concerned the amount of attorney's fees to be paid plaintiff's counsel. Obviously plaintiff will not proceed with litigation regardless of our resolution of the question relating to the government's asserted right to block the settlement by refusing to consent to the dismissal.

IV.

In addition to attempting to bar the settlement, the government also requested "a chance to be heard on the merits of this issue." (Tr. of Apr. 20, 1992 Hearing, at 8.) The district court essentially denied the government the opportunity to be heard, noting its impression that "the government actually has no standing any longer." (*Id.* at 9.) We assume the district court's impression was based on an interpretation of the Act under which, to raise any objection to the settlement at all, the government was required to intervene formally and take over the litigation. After carefully reviewing the language, history and purpose of the False Claims Act, we must reject the district court's analysis. The government, although it chooses not to fully intervene in the action, retains the right, upon a showing of good cause, to object to a proposed settlement. This right emerges from our interpretation of relevant sections of the Act.

The False Claims Act does not specifically address the government's rights when a *qui tam* plaintiff and defendant arrive at a settlement. The Act, however, does cover the converse situation in which the government settles an action. 31 U.S.C. § 3730(c)(2)(B) states:

> The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the

circumstances. Upon a showing of good cause, such hearing may be held in camera.[7]

The Act also recognizes that a *qui tam* plaintiff can settle a claim when the government does not proceed with an action. Section 3730(d)(2) states:

> If the Government does not proceed with an action under this section, the person bringing the action or *settling the claim* shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. (emphasis added)

Section 3730(d)(3) gives the court the power, under certain circumstances, to reduce the share of the proceeds of the action that the *qui tam* plaintiff would otherwise receive:

> Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of

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[7] In *Kelly*, we stated that on objection by a qui tam plaintiff to a settlement proposed by the government and a defendant, a hearing should be conducted only if the qui tam relator shows a "substantial and particularized need" for one. *Kelly*, 9 F.3d at 753-54 n. 11. We further stated that such a showing could be made if the relator presents a colorable claim that the government-authorized settlement or dismissal is unreasonable in light of the existing evidence. *Id.*

> the proceeds of the action which the person would otherwise receive . . . .

These sections indicate that the district court plays an important role in allocating the proceeds of a settlement by determining the amount to be received by the *qui tam* plaintiff within the overall limitation of no more than 30% of those proceeds (or the 10% limitation under specific circumstances where the relator's source of information comes from public sources). *See* § 3730(d).

We construe the Act as authorizing the district court to bar a *qui tam* plaintiff and defendant from artificially structuring a settlement to deny the government its proper share of the settlement proceeds. We hold the Act grants the district court the power to ensure that the government will receive its proper share of the settlement as provided by statute. Thus, while the government may not obstruct the settlement and force a *qui tam* plaintiff to continue litigation, the government nevertheless may question the settlement for good cause, as it sought to do in this case, with or without formal intervention and without proceeding with the litigation under § 3730(b)(2) or (c)(3).

In *Juliano v. Federal Asset Disposition Ass'n*, 736 F.Supp. 348 (D.D.C.1990), *aff'd*, 959 F.2d 1101 (D.C. Cir.1992), the court faced a similar "all or nothing" contention by the *qui tam* relator in objecting to the government's partial involvement in a case in which the government moved to dismiss some but not all defendants. The court stated:

> Under our federal scheme, the Attorney General, through those acting in his name, decides whom to prosecute for violations of federal law. The Court

> will not assume that the *qui tam* provisions of the False Claims Act were intended to curtail the prosecutorial discretion of the Attorney General. The Act nowhere states that federal prosecutors are confined to proceed in an all or nothing manner, being forced to take or leave the *qui tam* plaintiff's charges wholesale. Nor does the Act state that the *qui tam* plaintiff remains free to prosecute any person or entity he wishes, provided the government declines to take over the action. With these considerations in mind, the Court concludes that the government's motion to dismiss certain named defendants is entirely proper.

Id. at 351. We think it important that this circuit has cited this discussion of limited intervention in *Juliano* with approval. *Kelly*, 9 F.3d at 753 n. 10.

Under section 3730(c)(3), the government's right to intervene at a late date requires a "showing of good cause." This procedure is detailed in *Kelly*:

> Several of the control mechanisms built into the qui tam provisions are qualified. For example, the government . . . must show 'good cause' in order to intervene in an action which has already commenced. *Id.* § 3730(c)(3).

Id. at 753-54. We hold that the "good cause" language should also apply to the limited intervention sought here by the government. *See Juliano*, 736 F.Supp. at 351. As noted earlier, § 3730(c)(2)(B) of the Act authorizes the district court to review a settlement, on objection of the relator, to determine whether it is fair and reasonable. We now interpret the Act to provide a similar opportunity to the government; that is, when the government objects with good cause to a

proposed settlement, it has a right to a hearing, as would an objecting relator under § 3730(c)(2)(B).

Here, the government's objections to the proposed Killingsworth-Northrop settlement rest on good cause. The circumstance that the qui tam plaintiff will receive $2.7 million in settlement of his personal claim and attorney's fees in the face of a possible statute of limitations defense presents the issue whether the total proceeds of the settlement have been fairly allocated so as to give the government its due.[8]

Therefore, on remand the district court should hold a hearing to determine whether the proposed settlement fairly and reasonably allocates the settlement funds. If the district court approves the settlement, it may dismiss the case. On the other hand, if the district court finds that the amount to be paid to Killingsworth and his counsel is not a fair appraisal of the value of his case and services rendered by his counsel, it may disapprove the settlement as structured. In the latter instance, the parties are entitled to continue with the litigation.

Accordingly, we vacate the dismissal of the action and REVERSE AND REMAND this case for further proceedings consistent with this opinion.

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[8] We do not intend to express our view on the merits of this inquiry, however.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 88-6635 TJH (Ex)

UNITED STATES, EX REL. MAX KILLINGSWORTH,
PLAINTIFFS

vs.

NORTHROP CORPORATION,
A CALIFORNIA CORPORATION, DEFENDANT

CORRECTED JOINT STIPULATION OF DISMISSAL;
PROPOSED ORDER THEREON

[Filed May 19, 1992]

The parties to this action, by and through their counsel of record, hereby stipulate as follows:

1. The present action (the "Action") was brought against defendant Northrop Corporation ("Northrop") by *qui tam* plaintiff Max Killingsworth ("Killingsworth") on behalf of the United States Government pursuant to the False Claims Act, 31 U.S.C. § 3729 *et seq.* (the "Act"), and on his own behalf for personal wrongful discharge claims under California law.

2. Pursuant to Section 3730(b) of the Act, the government investigated Killingsworth's claims under the Act and subsequently filed a notice with this Court stating that it would not participate in the Action.

3. Killingsworth has decided to settle this action in its entirety and not to prosecute further the claims alleged in the original Complaint or the First Amended Complaint.

4. On March 4, 1992 Killingsworth filed a motion with this Court seeking a ruling that the consent of the government to dismissal of the Action with prejudice was unnecessary. On April 16, 1992 Northrop filed a memorandum in support of Killingsworth's motion, contending that where, as here, the government has declined to participate in an action under the Act, and that action is not discontinued or withdrawn but in fact is brought to fruition by the relator, the government cannot frustrate settlement merely by withholding its consent to dismissal.

5. On April 20, 1992, after hearing argument in this regard, the Court agreed with Killingsworth and Northrop and indicated that its "intended ruling [was] that the government actually has no standing any longer to object" to dismissal of the Action. (*See* Reporter's Transcript of Proceedings, April 20, 1992, at p. 9). The Court further ordered that the government notify counsel for Killingsworth and Northrop by May 4, 1992 whether it consented to dismissal of the Action and, if it did not so consent, that it file a motion by that date seeking leave to intervene in the Action. *Id.*, at pp.10-11. The Court also stated that it did not believe the government could establish its entitlement to intervene at this late date. *Id.*, at p.11.

6. On May 4, 1992 the government informed counsel for Killingsworth and Northrop that it did not consent to dismissal of the Action. Contrary to the Court's order, however, the government did not file a motion seeking leave to intervene in the Action.

7. Killingsworth agrees to dismiss the Action with prejudice as to both himself and the United States.

Dated: May 15, 1992

LAW OFFICES OF HERBERT HAFIF

By /s/ Phillip E. Benson by B. Br.
PHILLIP E. BENSON
Attorneys for Plaintiff MAX KILLINGSWORTH, on his own behalf and for the United States.

Dated: May 15, 1992

MUNGER, TOLLES & OLSON
BRAD D. BRIAN
TERRY E. SANCHEZ
MARC T.G. DWORSKY

By /s/ Brad D. Brian
BRAD D. BRIAN
Attorneys for Defendant

* * * * *

IT IS ORDERED that the Attorney General's consent to dismissal is not required in the present circumstances, and that the instant action is dismissed in its entirety with prejudice as to both the *qui tam* plaintiff and the United States.

Dated: May 19, 1992 /s/ TERRY J. HATTER, JR.
HONORABLE TERRY J. HATTER, JR.
United States District Court

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-56599
D.C. No. CV-88-6635-TJH

UNITED STATES OF AMERICA, EX REL.
MAX KILLINGSWORTH, PLAINTIFF-APPELLANT

vs.

NORTHROP CORPORATION,
DEFENDANT-APPELLEE

[Filed March 22, 1996]

ORDER

Before: POOLE and O'SCANNLAIN, Circuit Judges, and MARQUEZ,* District Judge

Judges Poole and O'Scannlain have voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc. Judge Marquez has voted to grant the petition for rehearing but to deny the suggestion for rehearing en banc.

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* The Honorable Alfredo C. Marquez, Senior United States District Judge for the District of Arizona, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX F

STATUTORY PROVISIONS

Section 3730 of Title 31 of the United States Code provides:

Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.-The Attorney General diligently shall investigate a violation under Section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this Section against the person.

(b) ACTIONS BY PRIVATE PERSONS.-(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene

and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall-

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.-(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to

continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as-

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses; or

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.-(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing in a congressional, administrative, or

Government[1] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action

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[1] So in original. Probably should be "General".

was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.-(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary,

or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government[2] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

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[2] So in original. Probably should be "General".

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.-The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.-In civil actions brought under this section by the United States, the provision of Section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.